

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3)
4 UNITED STATES OF AMERICA,)
5)
6 Plaintiff,) Criminal Action
7 v.) No. 13-10200-GAO
8)
9 DZHOKHAR A. TSARNAEV, also)
known as Jahar Tsarni,)
10 Defendant.)
11)

12 BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
13 UNITED STATES DISTRICT JUDGE

14 SEALED LOBBY CONFERENCE

15 Excerpted from Day 57 of Jury Trial

16
17 John J. Moakley United States Courthouse
18 Courtroom No. 9
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Thursday, May 7, 2015
22 12:38 p.m.

23 Cheryl Dahlstrom, RMR, CRR
24 Official Court Reporter
25 John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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On Behalf of the Defendant.

1 (LOBBY CONFERENCE AS FOLLOWS:

2 THE COURT: So I've been thinking about this issue,
3 and I think it is a substantial enough issue for either side,
4 either way it goes, that I want to take my time on it, and I
5 want more information. I think we're going to suspend today.
6 If she gets called, she can get called on Monday morning. If
7 she doesn't get called on Monday morning, we'll do something
8 else. But I would like from the defense a very specific
9 proffer so I will know exactly what she proposes to say, okay?
11:38 10 Detailed.

11 MS. CONRAD: Okay. But should that include, for
12 example, the issue of remorse?

13 THE COURT: It should include anything you would
14 propose to ask her about. I could conceive that I would look
15 at it and say, That's okay; that isn't. That's why I want it
16 so specific.

17 MS. CONRAD: May we make that ex parte so the
18 government --

19 THE COURT: No, no, no. I want them to weigh in on it
11:39 20 too. I would like that and any authority you would like to
21 submit for doing it this way and so on and so forth, any
22 applicable -- I'd like that, since you've been thinking about
23 this for a while -- I'm not going to squeeze you.

24 MS. CONRAD: The government just filed last night,
25 but, yeah.

1 THE COURT: But you know you were going to try to use
2 her. So by noon tomorrow, if I could, okay? And then I'd like
3 from the government a response by 5 on Saturday, okay?

4 MR. WEINREB: That's no problem.

5 THE COURT: Then I'll have some time to look at it
6 before we convene on Monday morning.

7 MR. WEINREB: I assume though that that will be it
8 from the defense for Monday morning. This is not --

9 THE COURT: That is the end of the evidence for the
11:40 10 defense?

11 MR. BRUCK: Yes.

12 MR. WEINREB: So we'll be ready to go on Monday.

13 THE COURT: So you want to tell us anything about
14 that?

15 MR. WEINREB: Well, we're still deciding.

16 THE COURT: This is my nondirective counseling.

17 MR. WEINREB: The only thing I think we could tell you
18 is that -- because we really think that we didn't quite get
19 enough into B.O.P. today, that we will likely have someone from
11:40 20 B.O.P. who is actually knowledgeable to testify about some
21 matters in rebuttal. I know it has to be genuine rebuttal. I
22 understand that.

23 THE COURT: It has to be genuine rebuttal; it has to
24 be new, that is to say, noncumulative.

25 MR. WEINREB: Well, noncumulative, but I think that

1 this witness has left a lot of questions with the jury because
2 he -- he gave a lot of answers where he really didn't know what
3 he was talking about.

4 THE COURT: You know what? I think maybe we should
5 have a proffer from you on that so the defense can see, and we
6 can fight it out before we're out in front of the public.

7 MR. BRUCK: You're thinking about one witness or --

8 MR. MELLIN: I would say possibly two but two very
9 short witnesses, one being Ms. Nicolet and then one being the
10 warden, again, very focused on specific points.

11 Your Honor, frankly, the other issue is the amenities
12 issue that the Court has kept out up to this point. Mr. Bezy
13 --

14 THE COURT: I think they've heard a lot about it,
15 actually.

16 MR. MELLIN: Not about television and what they can
17 actually listen to while they're in the room. Mr. Bezy made
18 the point of saying that these people will be locked down in
19 their cell, and that's just leaving an impression with the jury
20 that --

21 THE COURT: It will be part of your proffer, so we'll
22 look at it then.

23 MR. WEINREB: Why hide this from the jury when they've
24 been given so much other information about prison life? Why
25 hide this one fact, which is a significant fact that we want to

1 put in front of them to complete the picture?

2 MS. CONRAD: Why hide remorse from the jury?

3 MR. BRUCK: I mean, we've briefed the issue about why
4 and what the relevance of our showing was, and the fact that
5 Mr. Mellin asked the questions on cross, not about H Unit but
6 about ADX, and got an answer he didn't like doesn't open the
7 door.

8 MR. MELLIN: I didn't get an answer I didn't like,
9 your Honor. I just wasn't given a chance to expand on his
11:42 10 answer.

11 THE COURT: Anyway, put it in your proffer.

12 MR. WEINREB: So we have that. The rest of it is
13 really -- I mean, they just finished their case. We're still
14 trying to --

15 THE COURT: Do you have a general time estimate?

16 MR. WEINREB: For when we'll have a list?

17 THE COURT: No, for how long you'll --

18 MR. WEINREB: Oh, yes. I think a day.

19 THE COURT: Monday?

11:42 20 MR. WEINREB: Monday.

21 MR. CHAKRAVARTY: Assuming this last defense witness,
22 if she's called, doesn't take very long, I think we expect to
23 finish in one day.

24 MR. WEINREB: Yes, I think that's realistic.

25 MR. BRUCK: A day with B.O.P. or you've got other --

1 MR. WEINREB: No, no, Probably -- there are half a
2 dozen civilians we're thinking of calling and potentially one
3 expert.

4 MR. CHAKRAVARTY: Potentially.

5 MR. WEINREB: Is that right?

6 THE COURT: Okay.

7 MR. WEINREB: One or two but they would be brief.

8 MS. CONRAD: When will we find out who those are and
9 get any *Jencks* that hasn't previously been provided?

11:43 10 MR. WEINREB: I don't think there's any *Jencks* that
11 wouldn't have previously been provided. I mean, you know,
12 we've been getting the witness list from the defense and the
13 exhibit lists 7:30 the night before the witnesses have
14 testified.

15 MS. CLARKE: That's really not correct. We've tried
16 to help you with the order the night before. We gave the
17 witness list and in pretty much the order, and we kept trying
18 to give you a more precise order. That's certainly not true,
19 Bill.

11:43 20 MR. WEINREB: I disagree. Big changes have been made
21 along the way that have really prevented us from getting ready
22 for a lot of witnesses till 7:30 the night before.

23 MS. CONRAD: Are these all witnesses who are all on
24 your statutory witness list?

25 MR. WEINREB: Yes -- no. The statute doesn't apply to

1 rebuttal.

2 MS. CONRAD: So we don't have any notice as to who
3 these witnesses are.

4 MR. MELLIN: We just gave you the two witnesses from
5 B.O.P.

6 MS. CONRAD: Right. I want to know about the civilian
7 witnesses.

8 MR. WEINREB: Well, we haven't decided yet. I think,
9 when we decide, we'll let you know.

11:44 10 MS. CONRAD: Which will be when?

11 MR. WEINREB: As I said, we'll endeavor to do it as
12 quickly as we can.

13 THE COURT: How about the other deadline, the Saturday
14 at 5:00?

15 MR. WEINREB: Well, it's possible there are -- we
16 could give them a preliminary list.

17 THE COURT: Do what you can.

18 MR. WEINREB: At least a partial list Saturday at
19 5:00.

11:44 20 MR. BRUCK: Can you tell us the experts you're
21 considering calling?

22 MR. WEINREB: Yes. Park Dietz and --

23 MR. MELLIN: Al Francis?

24 MR. WEINREB: Not Edward --

25 MR. BRUCK: Not Aguirre?

1 MR. WEINREB: Not Aguirre.

2 MR. BRUCK: So Park Dietz and --

3 MR. WEINREB: Al Francis.

4 MS. CONRAD: Dietz is in rebuttal to what?

5 THE COURT: Well --

6 MR. WEINREB: I don't need to get into that.

7 THE COURT: Some other forum. This is mine right now.

8 MS. CONRAD: Well --

9 THE COURT: One thing, I'm just trying to sketch out
11:44 10 what next week might look like. And so one possibility is
11 completed on Monday. If that's the case -- no matter what it
12 is, I think we'll take a day between the completion of the
13 evidence and the proceeding to arguments and charge. So, for
14 example -- and this is a sketch -- finish Monday. Tuesday is
15 everybody's working on preparation, and Wednesday we present it
16 to the jury.

17 MR. WEINREB: Right.

18 THE COURT: That would sort of track, if it was
19 Tuesday, we'd probably take Wednesday and do it on Thursday.
11:45 20 That's subject to amendment as conditions recommend.

21 MS. CONRAD: So on Dietz and on the other experts --
22 the other expert, I mean, are we going to get expert witness
23 disclosure?

24 THE COURT: I presume there was some.

25 MS. CONRAD: I think there should be a proffer at

1 least on Dietz as to whether this is actual rebuttal.

2 MR. WEINREB: That's the point, your Honor. We have
3 to wait until the close of the defense case to determine what
4 it is we need to rebut. We will give a disclosure, yes.

5 THE COURT: One thing that might affect that and the
6 government's decision-making may be the final list of
7 mitigating factors because then, once that's fixed, they will
8 be able to assess what they need to do, so I'd like to --

9 MR. BRUCK: We could do that except for the ruling on
10 Sister Helen.

11 THE COURT: So it might not be possible until Monday,
12 so that might build in --

13 MR. MELLIN: Can we not get the final list now or
14 tomorrow so that -- including --

15 THE COURT: How about this: How about the final list
16 with her in it? And then if she's in, fine; if she's not, then
17 that piece comes out or whatever.

18 MS. CLARKE: Didn't we submit a larger list already?

19 THE COURT: It's been sketched, I think. I'm not sure
11:46 20 we have a final. I want a nonmoving version of it.

21 MR. BRUCK: We can do that.

22 THE COURT: Except for the one possible extraction if
23 she doesn't testify, if that happens. I mean, maybe it doesn't
24 affect the list at all. But if her testimony would affect the
25 list, include whatever would relate to her testimony; and if

1 she doesn't give it, then it will come out.

2 MR. WEINREB: I omitted to mention, one witness we
3 might put on would be a -- I don't know if it would be a reader
4 or -- but there are a few records that we may seek to put on
5 just like the defense did.

6 MR. BRUCK: Whose?

7 MR. WEINREB: Well, we'll give you notice.

8 THE COURT: Okay.

9 MR. WEINREB: We want to compile the list.

11:47 10 THE COURT: I guess that's it for now. So we'll
11 excuse the jury.

12 MR. WEINREB: There's some outstanding motions.

13 THE COURT: Yes.

14 MR. BRUCK: Before we leave mitigating factors, the
15 deadline I just agreed to was when?

16 THE COURT: I don't know that we had one.

17 MR. BRUCK: Okay, good. I withdraw the question.

18 MR. MELLIN: Can we ask for it tomorrow?

19 MS. CLARKE: I'm beginning to wonder, if we're going
11:47 20 to end up with all of this clog of information over the
21 weekend, if you want to start the jury back on Tuesday so you
22 can resolve rebuttal issues and things on Monday, because I can
23 predict there's going to be a problem.

24 MR. BRUCK: They will be in the jury room and we'll be
25 struggling.

1 MR. WEINREB: Or we could bring them back in later on
2 Monday. I don't think we're going to be long. If we call
3 civilians they will be quick, at least on direct.

4 MS. CLARKE: I can just predict, two psychiatrists as
5 experts, we're going to have a real problem trying to figure
6 that out.

7 MR. WEINREB: There wouldn't be any psychological
8 testimony. Basically, it would be -- there was a tremendous
9 amount of evidence that came in in the defense case about the
11:48 10 defendant's social history, his background going back several
11 generations, the places that he lived, the conditions under
12 which he was raised, his parents' ability to provide for him,
13 various things like that. And the testimony that we would
14 propose to offer would simply be on those subjects, to complete
15 the picture, so to speak.

16 MS. CONRAD: But not opinion?

17 MS. CLARKE: We put on lay witnesses who were subject
18 to cross-examination. This is going to open a can of worms for
19 the Court to be able to --

11:49 20 THE COURT: I can't now on this, but I understand the
21 point that it will require some attention.

22 MR. WEINREB: Yeah. The only problem with coming back
23 Tuesday is that then, if we were to take a day off and do the
24 closings and the instructions on Thursday, they wouldn't begin
25 deliberating except after three days -- unless you're going to

1 make them come back on Friday.

2 THE COURT: Oh, yeah. Once they deliberate, Fridays
3 are in play. So if they get it on Thursday, they would
4 deliberate Thursday, Friday.

5 MR. CHAKRAVARTY: We may pare down and --

6 MR. WEINREB: I think the -- despite my own
7 long-windedness, we could argue these things Monday morning.
8 We'd come in and get started on Monday.

9 MS. CLARKE: So --

11:50 10 THE COURT: I think I'd prefer that. I'd like to keep
11 things moving along. I don't like the jury sitting out there
12 not working.

13 MR. WEINREB: We could have them come in at 11.

14 THE COURT: No. I think they'll come in, and we have
15 arrangements for them. So I don't want to start micromanaging
16 that. So if it takes -- we'll just try -- we could -- we could
17 plan to start at 8:30 to save a little time. Is that a problem
18 for --

19 MR. WEINREB: No.

11:50 20 MS. CLARKE: No.

21 MR. WEINREB: That's fine.

22 MS. CLARKE: Can I get rid of these technical things
23 before we push it into Monday? We have marked Exhibit 4010,
24 which is the disk of Mr. Chakravarty's closing argument, that
25 portion of the closing argument. I just wanted to have that

1 marked for identification and made part of the record.

2 THE COURT: Okay.

3 MS. CLARKE: So that's done. And then the Court
4 excluded the SMS text message, and that has been previously
5 marked as 3200 and 3200A.

6 THE COURT: The Zubeidat --

7 MS. CLARKE: Yes. That's the Russian text with the
8 English translation which was excluded. We just want that to
9 be marked for identification as part of the record. I think
11:51 10 I'm doing it incorrectly.

11 MS. CONRAD: No, you're not. That's different.

12 MS. CLARKE: And also 3249 and 3249A.

13 THE COURT: Which were this morning's.

14 MS. CLARKE: Right, should be marked for
15 identification and made part of the record.

16 THE COURT: I think --

17 MS. CLARKE: Not for the jury because they've been
18 excluded.

19 THE COURT: It was my understanding that anything that
11:51 20 has a number has been marked for identification.

21 MS. CLARKE: Many of the things have never been talked
22 about.

23 MS. CONRAD: And some haven't been offered. They need
24 to be part of the court's record for purposes of appeal.

25 THE COURT: That's a good question. All right. I'll

1 have to consult with the IT people about what happens in that
2 circumstance.

3 MS. CLARKE: Sure. There were a lot of items provided
4 that were never identified.

5 THE COURT: This gets into the technical operation of
6 the JERS system. I think for this -- my brief answer is, I
7 think, for this phase, they are, in fact, marked for
8 identification whether they've been offered or not. That was
9 not true in the first phase because we didn't load everything
11:52 10 into JERS in the first instance because of the volume. But as
11 I understand it, in this phase we did. Whatever marked
12 exhibits either side had was just loaded in. That's the
13 standard operation of JERS, which is, is the total universe.

14 Then the accounting goes as follows: There's a date
15 when the item is identified, referred to in testimony, and then
16 there's a date when it is admitted. So you'll see, for
17 unadmitted exhibits, that it was identified on such and such
18 occasion, but there will be no admission date. When the system
19 sends the exhibits to the jury monitor for their consideration,
11:53 20 it sends only the subset of admitted exhibits, but there still
21 is a master list that shows they have been identified and not
22 admitted. I think, for the second phase, we're probably all
23 right, but we'll check with them.

24 MR. FICK: The exceptions are, as in the first phase,
25 Exhibit 3206 in the second phase were computer files that can't

1 go on JERS, so that, I presume, will go on the standalone
2 computer that goes back to the jury. It's simply an addition.
3 Then the government's closing is never on the JERS, so we just
4 want to make sure it's in the transcript what it has been
5 numbered so the Court of Appeals can identify it later if it
6 goes on appeal.

7 MS. CLARKE: The other thing, we had asked the Court
8 to make it clear for the record which juror, by number, was
9 sick.

11:53 10 THE COURT: I don't know why that matters.

11 MS. CLARKE: We don't know why it mattered either, but
12 it could matter in the future, and we thought that it would
13 be --

14 THE COURT: Why would it matter in the future?

15 MS. CLARKE: I don't know. We don't know. We don't
16 know what kind of misconduct could have occurred we don't know
17 about, whether this is a person we moved to challenge for cause
18 and stayed on the jury. We don't know whether there's going to
19 be some kind of claim of what the sickness was. We have no way
11:54 20 of knowing, but this is the only time we can ask the Court to
21 identify the juror for purposes of the record.

22 THE COURT: Well, do you have any reason for being
23 concerned about any particular juror?

24 MS. CLARKE: At this point in time, beyond what we
25 know and have argued in the past about challenges for cause,

1 no.

2 MR. WEINREB: I don't think it's appropriate to add
3 things to the record when the proponent of it can't offer any
4 grounds for it or any reason for it.

5 MS. CONRAD: It's just a question of the record. I
6 mean, it's not --

7 THE COURT: I don't see its germaneness, but I'll
8 think about it.

9 MR. WEINREB: Another thing might be worth some
11:54 10 thought -- I don't know -- is whether it's advisable to include
11 in the record items which were marked because of the
12 possibility that they might want to be -- that counsel might
13 want to refer to them in court but never were referred to. In
14 other words, the defense marked an enormous amount of things, a
15 number of things. We may have done the same for all I know.
16 It seems odd to say keep all that in the record when --

17 THE COURT: I think it is a function of the JERS
18 system that it is.

19 MR. WEINREB: But we could submit a new JERS disk,
11:55 20 like we did at the end of the guilt phase, that is, a list of
21 the things that were actually identified --

22 THE COURT: I don't know.

23 MR. WEINREB: -- and then were admitted.

24 THE COURT: We'll have to talk about that with the IT
25 people.

1 MS. CLARKE: The last thing is I don't think the Court
2 has ruled on the Waltham issue.

3 THE COURT: Yeah. The motion is denied for the usual
4 reasons. It's been denied before, basically. That's one
5 reason, that it's not really new matter. I'm not sure that I
6 straight up have the authority to order the state authorities
7 to give me their law enforcement materials. I don't know.
8 Maybe I do. But, in any event, I think the law enforcement
9 privilege applies.

11:56 10 MS. CONRAD: Certainly, the Court has the authority to
11 order a police department --

12 THE COURT: I don't know. In a case where the police
13 department is in front of me, I agree. It's a separate --

14 MS. CONRAD: Internal Affairs files for a witness,
15 Boston police officer witness, done all the time.

16 THE COURT: That's because the officer is in front of
17 me. Anyway, I don't want to debate it. There are multiple
18 reasons why the motion is denied. Most of them you're familiar
19 with.

11:56 20 MR. CHAKRAVARTY: Your Honor, there's one quick thing.
21 I'm not sure whether we want to ask for this, but for purposes
22 of -- if we -- the last defense witness testifies, we may want
23 to do our own investigation of the witness. And to the extent
24 that the witness is going to testify about contact she had with
25 the defendant, then we want to make sure we're not running

1 afoul of the SAMS or some other procedures in order to obtain
2 that information, for example, when and where the meetings
3 occurred and the duration of those meetings.

4 MR. WEINREB: In general, we think there no longer
5 would be a firewall between us and Terence Donnelly (ph), who
6 was overseeing the SAMS. The case is over pretty much.
7 There's no longer an interest in the secrecy of it. Now that
8 the defense is offering somebody who was permitted to meet with
9 the defendant pursuant to the SAMS, we need to know. It's a
11:57 10 waiver.

11 MS. CONRAD: We need to know what?

12 THE COURT: I think that has to be part of the proffer
13 actually. I want to know the basis of her testimony, which
14 would include details about when she had any meetings, what
15 transpired in the meetings, et cetera, in some detail.

16 MR. WEINREB: But we also need to know the authority
17 under which she went to see the defendant so that we can
18 potentially impeach that. Basically, we need to know if she's
19 part of the defense team because that would obviously give her
11:58 20 a bias.

21 THE COURT: Let's see what the --

22 MS. CONRAD: She's not a paid expert if that's what
23 you're asking.

24 THE COURT: I understand the point. So when I say
25 detailed, I mean it. Okay. All right.

1 So let's call the jurors out from their lunch probably
2 and let them know that they'll be back on Monday.

3 MS. CONRAD: Should we let them finish their lunch and
4 then --

5 THE COURT: They can go back in.

6 . . . END OF LOBBY CONFERENCE.)

7 (The jury entered the courtroom at 1:02 p.m.)

8 THE COURT: Jurors, again, we appreciate your
9 patience. There are some issues we've been working on.
01:03 10 Actually, we need a little bit more time. We're going to
11 actually end the day today here and the week and ask you to
12 come back on Monday. I think this approach will make it
13 smoother on Monday when we actually get going. All right.

14 So, once again, I caution you to avoid any discussion
15 of the case. Don't make up your mind about any of the issues
16 in the case, of course, and, as much as you can, as you've told
17 me you have been able to do, avoid any accounts of the media in
18 the case.

19 Have a good weekend. It looks like the weather is
01:04 20 going to be delightful for a change. And we'll see you on
21 Monday morning. We'll be in recess.

22 THE CLERK: All rise for the Court and the jury. The
23 court will be in recess.

24 (Whereupon, at 1:04 p.m. the trial recessed.)

25

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter to
the best of my skill and ability.

/s/Cheryl Dahlstrom

Cheryl Dahlstrom, RMR, CRR

Official Court Reporter

Dated: April 23, 2018